SUPREME COURT, U. S.

APR 24 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1211.

NORTH AMERICAN ROCKWELL CORP.,
Petitioner,

and

MRS. SMITH'S PIE CO.,
Third-party Defendant,

v.

STANLEY KNAPP, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

HOWARD J. CRESKOFF,
FREEDMAN, BOROWSKY & LORRY,
8th Floor, Lafayette Building,
5th and Chestnut Streets,
Philadelphia, Pa. 19106
Counsel for Respondent.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Stanley Knapp, Jr., respectfully prays that petitioner's application for a Writ of Certiorari to review the final judgments of the United States Court of Appeals for the Third Circuit, entered on February 27, 1974 and December 27, 1974 be denied.

OPINIONS OF THE COURTS BELOW.

The Opinion of the District Court is unreported but is printed in the Petition for Writ of Certiorari, from p. 8a to p. 12a. The Opinion of the Court of Appeals for the Third Circuit and the concurring Opinion are unreported but printed in the Petition for a Writ of Certiorari, from p. 23a to p. 45a.

JURISDICTION.

This Court does not have jurisdiction of Question I of the Petition as it is out of time to file a Petition for Writ of Certiorari in March of 1975 questioning an Order entered by the United States Court of Appeals for the Third Circuit on February 27, 1974.

Jurisdiction as to Question II of the petitioner is invoked under 28 U. S. C. § 1254(1).

COUNTER STATEMENT OF THE QUESTIONS PRESENTED.

1. Whether petitioner filed a timely Petition with this Court questioning the jurisdiction of the Court of Appeals, and, if answered in the affirmative, whether the appeal filed by respondent in the Court of Appeals was timely?

2. Whether the Court of Appeals was in error in reversing the grant of Summary Judgment in the District Court on the ground that one injured by a defective machine may recover from the corporation that had purchased substantially all the assets of the manufacturer of the machine because the transaction was a merger or a consolidation rather than a mere sale of assets?

COUNTER STATEMENT OF THE CASE.

1. Procedural.

This diversity matter was instituted pursuant to 28 U. S. C. § 1332 and is a products liability action brought by respondent, Stanley Knapp, Jr., a Pennsylvania resident, against petitioner, North American Rockwell Corp., a Delaware Corporation.

On June 19, 1973, petitioner filed a Motion for Summary Judgment. On June 19, 1973 the Motion was granted by an Order entered on September 6, 1973 (1a).[1] On October 5, 1973, respondent's Motion for Rehearing and Reconsideration was served on opposing counsel and docketed on October 11, 1973 (1a). That Motion was denied by an Opinion and Order dated November 21, 1973 and docketed November 26, 1973 (1a). On December 14, 1973, that Order was appealed to the United States Court of Appeals for the Third Circuit and received by the Court of Appeals on December 19th (Petition, 5a). On January 23, 1974, petitioner filed a Motion to Dismiss the Appeal on the grounds that it was untimely (Petition, 5a). On January 30, 1974, respondent filed an Answer and Memorandum of Law Contra the Motion to Dismiss the Appeal (Petition, 5a), and on February 25th, the Motion to Dismiss the Appeal was submitted to the Court. The Coram was Hunter, Weis and Miller, D. J. (Petition, 5a), and on February 27th, an Order was entered by Judge Hunter denying the Motion to Dismiss the Appeal for lack of jurisdiction (Petition, 5a).

The Briefs of the petitioner and respondent on the merits were thereafter filed with the Court of Appeals for the Third Circuit (Petition, 6a), and on September 10,

1. All page references are to the Joint Appendix on Appeal to the United States Court of Appeals for the Third Circuit, unless otherwise noted.

1974, the matter was argued before Judges Aldisert, Adams, and Rosenn (Petition, 6a). On December 27, 1974, the opinion of the Court was filed reversing the judgment of the District Court, filed September 5, 1973, and the order of the District Court, filed November 26, 1973, and remanding the cause for further proceedings consistent with the opinion of the Court of Appeals (Petition 6a).

The petitioner thereafter filed a Petition for Writ of Certiorari.

II. Factual.

Respondent, Stanley Knapp, Jr., an employee of Mrs. Smith's Pie Company, third-party defendant, was seriously and permanently injured on October 6, 1969, when his hand was caught in a machine known as a "Packomatic". It is the contention of the respondent that the machine was negligently designed and manufactured. The machine had been designed, manufactured and sold by the Textile Machine Works (hereinafter identified as TMW) to Mrs. Smith's Pie Company in 1966 or 1967.

On April 5, 1968, TMW entered into an agreement with petitioner whereby TMW exchanged substantially all of its assets for stock in the petitioner. TMW retained only its corporate seal, its Articles of Incorporation, its Minute Books and other corporate records, and $500,000 in cash intended to cover TMW's expenses in connection with the transfer. Any of the $500,000 remaining at the time of the dissolution of TMW was to be returned to the petitioner. Included in the assets acquired by the petitioner was the right to use the name "Textile Machine Works." On the closing date, TMW was to change its name, distribute petitioner's stock to its shareholders and to dissolve "as soon as practicable after the last of such distributions" (11a).

The agreement reached by petitioner and TMW also stipulated that petitioner would assume specified obligations and liabilities of TMW, and certain other "obligations" (88a), but among the liabilities not assumed were: "(a) Liabilities against which TMW is insured or otherwise indemnified to the extent of such insurance or indemnification unless the insurer or indemnitor agrees in writing to insure and indemnify (petitioner) to the same extent as it was so insuring and indemnifying TMW." (88a).

Closing took place pursuant to the agreement on August 29, 1968 (89a). Thereafter, respondent was injured and sued petitioner to recover for his personal injuries on the ground that the transaction between petitioner and TMW was a merger or consolidation, not a mere sale of assets, thus subjecting petitioner to liability.

Although petitioner could have joined TMW in the instant litigation, it did not do so. Respondent did not and has not brought a viable action against TMW in any other court. Petitioner did, however, join respondent's employer, Mrs. Smith's Pie Company, as a third-party defendant, but, as previously stated, did not join TMW, the company petitioner now claims was the proper party to sue.

Petitioner raises two questions: 1. That the Appeal was untimely to the Court of Appeals and that Court, therefore, lacked jurisdiction; 2. That the Court of Appeals improperly reversed the grant of Summary Judgment by the District Court.

Respondent's Appeal to the Court of Appeals was timely and the decision of the Court of Appeals was proper both as to the timeliness of the Appeal to it and in reversing the Judgment of the District Court.

REASONS WHY THE WRIT SHOULD BE DENIED.

The issues in the present case are uniquely narrow, and, the petitioner's arguments notwithstanding, it is difficult to conceive that the issues warrant review by this Court on Certiorari.

First, this Writ, insofar as it addresses itself to alleged error of the Court of Appeals' refusal to dismiss the Appeal to it as untimely, is itself untimely.

The petitioner, on January 23, 1974, filed a Motion to Dismiss the Appeal of the respondent in the Court of Appeals, alleging lack of jurisdiction (Petition, 5a). On January 30, 1974, respondent filed his Answer to the petitioner's Motion to Dismiss the Appeal in the United States Court of Appeals for the Third Circuit, and a Memorandum of Law Contra to the Motion to Dismiss (Petition, 5a). On February 25, 1974, the United States Court of Appeals for the Third Circuit listed the matter for consideration before the Honorable Judges Hunter and Weis of the United States Court of Appeals for the Third Circuit and Judge Miller from the United States District Court (Petition, 5a). On February 27, 1974, the Honorable James Hunter, III, of the United States Court of Appeals for the Third Circuit, denied the Motion of the petitioner to dismiss the Appeal of the respondent for lack of jurisdiction (Petition, 5a).

The time to file a Writ of Certiorari is governed by 28 U. S. C. § 2101(c):

* * *

> "Any . . . Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review, shall be taken or applied for within ninety days after the entry of such judgment or decree . . ."

* * *

Since the Order denying the Motion to Dismiss the Appeal was entered on February 27, *1974* (Petition, 5a), a Writ of Certiorari filed on March 25, *1975* is obviously far beyond the ninety days permitted by 28 U. S. C. § 2101(c), and the Appeal is, therefore, out of time. An application for Certiorari must be made within the time limited, *Bradford Electric Light Company, Inc. v. Clapper,* 1931, 52 S. Ct. 118, 284 U. S. 221, 76 L. Ed. 135.

Further, it was the decision of the United States Court of Appeals for the Third Circuit that the entire matter be remanded to the United States District Court for the Eastern District of Pennsylvania for trial and the case, therefore, does not have a final Order in its totality. Except in extraordinary cases, a Writ of Certiorari is not issued until a final decree. *Hamilton-Brown Shoe Company v. Wolf,* Mo. 1916, 36 S. Ct. 269, 240 U. S. 251, 60 L. Ed. 629. This is not an extraordinary case.

Respondent, Stanley Knapp, Jr., respectfully prays that petitioner's application for Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit on the basis that the Court of Appeals erred in accepting the appeal as timely be denied.

Assuming, *arguendo,* the timeliness of the Appeal is before this Court, then the United States Court of Appeals for the Third Circuit properly decided the Appeal to it was timely.

On June 18, 1973, the petitioner filed a Motion for Summary Judgment in the United States District Court for the Eastern District of Pennsylvania (82a). An Order was signed granting Summary Judgment on September 5, 1973, by the Honorable United States District Court judge E. Mac Troutman (103a), and was entered on the docket in the District Court on September 6, 1973 (101a). Respondent, thereafter, prepared a Motion for Reconsidera-

tion and Rehearing, which, according to the Federal Rules of Civil Procedure, was due on September 17, 1973. (The Order entering Judgment was docketed on September 6th. The Motion under Rule 59(e) F. R. C. P. to be timely must be filed within ten days or September 16th, which was a Sunday, therefore, the Motion was due the next day, September 17th.)

The morning that the Motion was due to be filed, respondent's attorney received a call from the chambers of Judge Troutman stating that the case was No. 3 in the trial pool. Faced with the dilemma of the prospect of an immediate assignment for trial and an Order in a Motion for Summary Judgment, respondent's counsel telephoned Judge Troutman, but was connected with the Judge's law clerk. The problem was discussed with the Judge's law clerk, who then advised respondent's counsel that he would confer with the Judge, and the law clerk then came back on the telephone, and advised respondent's counsel that the Judge had agreed until the attorneys involved were told whether the case was to be tried before a jury or whether the Motion for Summary Judgment had in fact been granted dismissing the case, the time for filing the Petition for Reconsideration would be enlarged.

That conversation was confirmed by a letter that same day, September 17th (Petition, 21a). The language in the letter (Petition, 21a), was couched in a tactful and respectful tone confirming the granting by the United States District Court Judge of an extension of time for filing the Petition for Reconsideration.

At no time did the attorney for the petitioner object to the letter of September 17, 1973, for the principle for which it stood (enlarging the time for filing the Petition for Reconsideration) until the Motion to Dismiss the Appeal was filed in the United States Court of Appeals on

January 23, 1974. Since the time for a direct appeal to the United States Court of Appeals for the Third Circuit had not yet expired as of September 17, 1973, an appropriate objection of the extension of time made by the attorney for the Petitioner, assuming, *arguendo*, that the District Court Judge did not have the power to enlarge the time to file, would have resulted in simply an appeal being taken directly to the Third Circuit rather than give the trial judge the opportunity to reconsider the granting of the Summary Judgment, or if even more time passed, an application in accordance with Rule 4 of the Federal Rules of Appellate Procedure.

Respondent's Motion for Reconsideration and Rehearing was served on counsel for the petitioner on October 3, 1973. (But docketed on October 11, 1973, in accordance with the Local Rules of the Eastern District of Pennsylvania.)

An Order denying the Motion for Reconsideration and Rehearing was signed by the trial judge on November 21, 1973, and that Order was docketed on November 27, 1973 (1a & 2a).

On December 14, 1973, respondent filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit, appealing the Order of November 21, 1973, which refers to the Order docketed September 6, 1973 (1a & 2a, Petition 5a).

The argument of the petitioner to this Court states that the appeal to the Court of Appeals was not timely, and has three aspects: That the denial of a Motion for Rehearing is not appealable; a Motion for Rehearing and Reconsideration is considered a Motion under Rule 59(e) F. R. C. P. for purposes of tolling the time for appeal; and a Rule 59(e) F. R. C. P. Motion does not toll the appeal period unless timely filed.

Respondent agrees that the denial of the Motion for Rehearing and Reconsideration is not appealable. It is the original Order that is appealable, no matter what the appeal is called or styled. *Gainey v. Brotherhood of Railway & Steamship Clerks,* 303 F. 2d 716 (3rd Cir. 1962).

Respondent also agrees that a Motion for Rehearing and Reconsideration is a Rule 59(e) F. R. C. P. Motion (or a Rule 60 F. R. C. P. Motion). *Gainey v. Brotherhood of Railway & Steamship Clerks, supra.*

What is crucial, then, is whether the Motion of the respondent for Rehearing and Reconsideration was timely, for if it was, then the appeal to the United States Court of Appeals for the Third Circuit was timely.

Rule 58 F. R. C. P. ties an appeal in to the entry of the judgment on the docket; before a judgment can become effective, it must be entered on the docket, and the appeal period does not begin to run until it is entered on the docket. *Levin v. Wearever Aluminum, Inc.,* 427 F. 2d 847 (3rd Cir. 1970).

A Motion for Rehearing and Reconsideration must be served within ten days of the entry of an Order on the docket. Rule 6, 58, 59(e), F. R. C. P.; U. S. District Court for the Eastern District of Pennsylvania, Local Rule 37.

The Order of the United States District Court Judge was docketed on September 6, 1973, and the ten day service period began to run, therefore, in accordance with Rule 6, F. R. C. P., the day after, or September 7th. The ten day service period expired on September 16th, but since that was a Sunday, in accordance with Rule 6 F. R. C. P., that day did not count in the ten day period, and the last day to serve the Motion became September 17, 1973.

On September 17, 1973, the day the Motion was to be served, the Court called to say that the case which had supposedly been dismissed because of a Motion for Sum-

mary Judgment, was No. 3 in the trial pool and ready for immediate assignment. Because of the dilemma that confronted counsel for your respondent, the letter of September 17, 1973, was mailed after the telephone conversation above described was completed (Petition, 21a).

As noted, the law clerk to the District Court judge discussed the problem with the trial judge, and advised respondent's counsel that it was the opinion of the Court that the Petition for Reconsideration filing time would be enlarged if the District Court Judge decided the case was not No. 3 in the pool. As soon as word was conveyed to respondent's counsel that the Motion for Summary Judgment had, in fact, been granted, the Motion for Rehearing and Reconsideration was served on the petitioner on October 3, 1973.

Service of the Motion was in accordance with Rule 5(b) and (d) F. R. C. P. and the United States District Court for the Eastern District of Pennsylvania Local Rule 36, and the Motion was filed with the Clerk of the United States District Court, in accordance with Local Rule 36, on October 11, 1973.

The Motion was accepted by the Court, and the Court requested a Reply Brief from the petitioner, which was complied with by the petitioner. The Court then reconsidered the matter and signed an Order dismissing the Motion, drafted a Memorandum Opinion dated November 21, 1973, and that Opinion and Order was docketed on November 27, 1973. Up to this time, the petitioner did not object to the procedure in question.

Respondent appealed to the United States Court of Appeals for the Third Circuit on December 14, 1973 (received by the Court on December 19, 1973 (Petition, 5a)), from the Order denying Reconsideration and Rehearing, which is actually an Appeal from an Order dismissing the

case. *Gainey v. Brotherhood Railway & Steamship Clerks, supra.* The essential issue then boils down to whether the Motion for Rehearing and Reconsideration was filed on a timely basis, and the answer is clearly yes.

The Motion for Rehearing and Reconsideration was filed after the ten day period in reliance on an official act of the District Court which was inconsistent with the granting of a Motion for Summary Judgment, i.e., listing the case for trial, and in specific reliance on the District Court Judge's assurances that if the case was not to be called for trial as a result of granting the Motion for Summary Judgment, then the Judge would grant an interim enlargement of the filing period for the Motion for Reconsideration and Rehearing.

Normally, an untimely Motion for Reconsideration is nulity and does not toll the time in which to appeal. The exception to that rule, as stated in *MacNeil Brothers Co. v. Cohen,* 264 F. 2d 190, 193 (1st Cir. 1959), is:

> "The only exception to this general proposition has been fashioned to cover situations in which the movant has been induced to forego filing his notice of appeal within thirty days by some action by the District Court indicating that the post-judgment motion was timely filed, when in fact it was not."

United States v. Merrick, 464 F. 2d 1087 (1st Cir. 1972). See also *Wolfsohn v. Hankin,* 376 U. S. 203, 84 S. Ct. 699, 11 L. Ed. 2d 404 (1964); *Harris v. Cherry Meat Packers, Inc.,* 371 U. S. 125, 9 L. Ed. 2d 61, 83 S. Ct. 283 (1962).

Since the respondent had most definitely been induced to forego filing his Motion for Reconsideration within ten days, and his Notice of Appeal within thirty days, by official action of the District Court indicating that the Post-Judgment Motion was timely filed, then the filing of the Appeal

became timely, and fits squarely within the letter and spirit of the Supreme Court decisions on this very issue. The Appeal was, therefore, properly and timely filed with the United States Court of Appeals; this very same issue had properly and previously been decided by the United States Court of Appeals in the instant case, i.e., that the appeal to the United States Court of Appeals for the Third Circuit was properly and timely filed.

WHEREFORE, respondent, Stanley Knapp, Jr., respectfully prays that Petitioner's Application for Writ of Certiorari to review the issue of whether the appeal was timely filed with the United States Court of Appeals for the Third Circuit be denied.

Next petitioner wants this Court to believe that the decision of the Court of Appeals presents a matter of overwhelming significance. This is not so. They state that the effect of the ruling would strongly limit the purchase and sale of businesses. That simply is not true. As aptly pointed out by the Court of Appeals, insurance is available to cover these contingencies, and, in fact, the insurance did exist in the instant case, and, in fact, petitioner purchased all of the assets, including the insurance (4a). There are many other avenues and alternatives that would permit one corporation to purchase the assets of another corporation and not subject the purchasing corporation to the liabilities of the selling corporation. The only reason that the petitioner purchased the assets rather than the shares of stock of the selling corporation (and limit its liability by only purchasing the shares of stock) was to bring itself within Section 368(a)(1)(c) of the Internal Revenue Code of 1954 so as to allow the buying corporation to issue its stock rather than cash and so that the exchange would be tax-free to shareholders of the selling corporation. Substantial benefits under the laws and statutes of the United

States inured to both parties as a result of this transaction in that the petitioner did not divest itself of any substantial cash in the transaction, other than to consummate the transaction, and the shareholders of the selling corporation were not taxed on their gain. If parties intelligently exercise the advantages of the structuring a transaction this way, then they should not complain of potential disadvantages that may accrue. Further, not all acquisitions will have the result of imposing liability on the purchaser, but only in the *specific unique circumstances in the instant case,* as outlined in the Opinion of the Third Circuit.

The respondent, before the United States Court of Appeals for the Third Circuit, argued that the transaction between the petitioner and TMW amounted to a *de facto* merger and, therefore, imposed liability on petitioner for damages caused by machines manufactured by its predecessor. The petitioner, however, states at page 13 of its Writ to this Court that:

> "The Court of Appeals analyzed numerous decisions decided under jurisdictions other than Pennsylvania and concluded that they 'suggest that the arrangement between Rockwell and TMW should be considered a sale rather than a merger or a continuation . . .'"

However, that is a cleverly stated half-truth, because a review of the Opinion (Petition, 32a) clearly shows that the United States Court of Appeals for the Third Circuit did not say that. What the Court said was:

> "The cases discussed above, all decided under the law of jurisdictions other than Pennsylvania, MAY suggest that the arrangement between Rockwell and TMW should be considered a sale rather than merger or a continuation . . . However, a number of considera-

tions indicate the insubstantially of the continued existence of TMW, including the brevity of the corporation's continued life, the contractual requirements that TMW be disvolved as soon as possible, the prohibition of engaging in normal business transactions, and the character of the assets TMW controlled. Although each of these factors was present in one or more of the above cases, the present Appeal is unique in combining all these elements. In addition, the better reasoned result would be to conclude that, for the purpose of determining liability to tortiously injured parties, the Rockwell-TMW transaction should be treated as a merger, and thereby subjecting Rockwell to liability for injuries caused by defective products distributed by TMW prior to that transaction." (Petition, 32a & 33a) (Emp. supplied)

Not only was that the position stated by the majority of the Court, but a concurring Opinion was also filed reaching the same result (Petition, 41a).

The United States Court of Appeals in reaching the decision it did in this case, looked to the unique aspects of this transaction wherein the petitioner acquired substantially all of the assets of the selling corporation, and the Court was not to be fooled by ignoring the substance of the transaction, and concluded that the Pennsylvania Courts also would not be fooled and would also look to find a cause of action in favor of an injured party. The United States Court of Appeals for the Third Circuit based only in part their decision on Pennsylvania public policy, by stating that public policy is better served by imposing liability on a defendant rather than permitting the petitioner here to raise formal, technical requirements to avoid liability (Petition, 33a). Therefore, the Court of Appeals decided this

case in favor of the respondent on the very firm basis of the facts unique to this case, and, therefore, the holding in this case does not contain very important questions of federal law.

The petitioner also misstates what *Granthum v. Textile Machine Works,* 230 Pa. Supr. Ct. 199 (1974), holds. The Pennsylvania appellate court in that case did consider the very same transaction between petitioner and TMW. The full caption of the case was *Helen Granthum, Appellant v. Textile Machine Works, North American Rockwell and Microswitch.* The plaintiff there brought suit against TMW which manufactured the machine, and North American Rockwell (petitioner here), who she claimed was also responsible under the theory that Rockwell became the successor corporation. The Pennsylvania Superior Court reversed the lower court (which granted a Summary Judgment letting North American Rockwell out of the case), by saying that the lower court acted prematurely in making a determination that no issue of fact existed as to (North American) Rockwell's transaction.[2]

Further, the Pennsylvania Superior Court emphasized that the language of North American Rockwell agreement agreed to accept liability for "obligations", and the Pennsylvania Superior Court questioned whether on the day of the agreement, Textile had "an obligation" with regard to future tort claimants which "obligation" Rockwell assumed, thereby subjecting Rockwell to liability.

Granthum v. Textile Machine Works and North American Rockwell, supra, matter was decided September 23, 1974; and the United States Court of Appeals for the Third Circuit decided the instant case on December 27, 1974; even

2. Pennsylvania law is that a Summary Judgment is to be entered only in the clearest of cases where there is not the slightest doubt as to the absence of a triable issue of material fact. *Prince v. Pavoni,* 225 Pa. Supr. Ct. 286, 302 A. 2d 452 (1973).

though the same attorneys represented North American Rockwell in both cases, they did not bother to send the Opinion, which it should have had at that time from the Pennsylvania Superior Court, to the Third Circuit, but decided only to advise this Court of a very narrow aspect of *Granthum* opinion which is helpful to it, rather than advise this Court that Pennsylvania Superior Court, in a very similar factual situation, infers that they seem to reach the same result that the United States Court of Appeals for the Third Circuit reached, but for different reasons. *Granthum v. Textile, supra,* at p. 203:

> "Lastly, we note that a question of fact may exist as to the meaning of the term 'obligations' which Rockwell expressly assumed . . ."

The decisions reached in the Court of Appeals are correct. There are no conflicts of decision between the Court of Appeals on this issue, given the unique facts of this case, and respondent's arguments both above and in his brief in the Court of Appeals are meritorious.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HOWARD J. CRESKOFF,
FREEDMAN, BOROWSKY AND LORRY,
Counsel for Respondent.